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In The

Supreme Court of the United States

October Term, 1996

ROBERT NMI MURRAY d/b/a AMERICAN SPEAKS,

Petitioner,

vs.

CABLE NATIONAL BROADCASTING COMPANY d/b/a AMERICA'S TALKING,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

I. Whether this Court's decision in *Markman*, holding that the Seventh Amendment guarantees patent owners a right to a jury trial on the issue of patent infringement, should also be extended to guarantee trademark owners the right to a jury trial on the issue of trademark infringement.

II. Whether this Court should resolve the current inter-Circuit conflict created as a result of the Ninth Circuit's holding that trademark infringement is an issue of law, which is in direct conflict with other Circuits that hold that trademark infringement is an issue of fact.

III. Whether reverse confusion is a proper ground upon which to state a cause of action for trademark infringement under the Lanham Act.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of Petitioner. Respondent Cable National Broadcasting Company d/b/a America's Talking is a wholly-owned subsidiary of National Broadcasting Company, Inc., which in turn is a wholly-owned subsidiary of National Broadcasting Company Holding, Inc., which in turn is a wholly-owned subsidiary of General Electric Company. General Electric Company has common stock and debt securities that are publicly traded.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. This Court's Decision In *Markman*, Holding That The Seventh Amendment Guarantees Patent Owners A Right To A Jury Trial On The Issue Of Patent Infringement, Should Be Extended To Guarantee Trademark Owners The Right To A Jury Trial On The Issue Of Trademark Infringement.	7
A. The Right To A Jury Trial In A Trademark Case Is No Different Than The Right To A Jury Trial In A Patent Or A Copyright Case.	7

Contents

Page

B. Seventh Amendment Historical Analysis Of Infringement Suits. 10

C. The Seventh Amendment Guarantees That Issues Of Fact Shall Be Tried By A Jury. 13

D. The District Court's And The Ninth Circuit's Decisions Deny Murray His Seventh Amendment Right To A Jury Trial On The Issue Of Infringement. .. 14

II. This Court Should Resolve The Current Inter-Circuit Conflict Created As A Result Of The Ninth Circuit's Holding That Trademark Infringement Is An Issue Of Law, Which Is In Direct Conflict With Other Circuits That Hold That Trademark Infringement Is An Issue Of Fact. 18

III. Reverse Confusion Is A Proper Ground Upon Which To State A Cause Of Action For Trademark Infringement Under The Lanham Act. 19

Conclusion 21

TABLE OF CITATIONS

Cases Cited:

AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611 (7th Cir. 1993) 18

Contents

Page

Allstate Ins. Co. v. Allstate Invest. Corp., 210 F. Supp. 25 (W.D. La. 1962), *aff'd*, 328 F.2d 608 (5th Cir. 1964) 16

American Intern. Group, Inc. v. London Am. Intern., 664 F.2d 348 (2nd Cir. 1981) 6, 18

AMF v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979) . 15

Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636 (1935) 11, 13

Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365 (10th Cir. 1977) 19, 20

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989) 10

C.I.R. v. Duberstein, 363 U.S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960) 14

Cass County Music Company v. C.H.L.R. Inc., 88 F.3d 635 (8th Cir. 1996) 6, 9, 10, 12

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) 16, 17

Country Floors v. Partnership of Gepner and Ford, 930 F.2d 1056 (3rd Cir. 1991) 18

Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837 (9th Cir. 1987) 9

Contents

	Page
General Conf. Corp. v. Seventh-Day Adventist Ch., 887 F.2d 228 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079, 110 S. Ct. 1134, 107 L. Ed. 2d 1039 (1990)	8, 9
Gnossos Music v. Mitken, Inc., 653 F.2d 117 (4th Cir. 1981)	10
Gorham Mfg. Co. v. White, 81 U.S. 511, 20 L. Ed. 731 (1872)	13
International News Service v. Associated Press, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 2d 211 (1918)	19
Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352 (9th Cir. 1985)	8
Markman v. Westview Instruments, Inc., __ U.S. __, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)	i, 6, 7, 8, 9, 10, 11, 12
Miller v. Fenton, 474 U.S. 104, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985)	13
Official Airline Guides, Inc. v. Goss, 6 F.3d 1385 (9th Cir. 1993)	9, 15
O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601 (1854)	12
Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947	20
Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)	16

Contents

	Page
Schwinn Bicycle Co. v. Ross Bicycles, Inc., 870 F.2d 1176 (7th Cir. 1989)	19
Sears, Roebuck & Co. v. Johnson, 219 F.2d 590 (3rd Cir. 1955)	16
Trademark Cases, 100 U.S. 82, 25 L. Ed. 550 (1879)	12
Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010 (7th Cir.), *cert. denied*, 502 U.S. 861, 112 S. Ct. 181, 116 L. Ed. 2d 143 (1991)	10
Statutes Cited:	
15 U.S.C. § 1114	2
28 U.S.C. § 1254(1)	1
United States Constitution Cited:	
Seventh Amendment	i, 1, 6, 7, 8, 9, 10, 11, 13, 17, 18
Rules Cited:	
Federal Rule of Civil Procedure 8(a)	16
Federal Rule of Civil Procedure 12(b)(6)	4
Other Authorities Cited:	
1 *A Memoir of Benjamin Robbins Curtis, L.L.D.*, 84 (B. Curtis ed. 1879)	12

Contents

Page

1 *McCarthy On Trademarks and Unfair Competition* § 5.02 12

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Ninth Circuit Filed August 9, 1996 .. 1a

Appendix B — Opinion of the United States Court of Appeals for the Ninth Circuit Filed June 18, 1996 ... 2a

Appendix C — Order of the United States District Court for the Central District of California Filed December 12, 1994 ..... 10a

Appendix D — Order Granting CNBC's Motion to Dismiss with Prejudice of the United States District Court for the Central District of California Filed October 3, 1994 ..... 17a

Appendix E — Relevant Statute 15 U.S.C. § 1114 ..... 22a

Appendix F — Amended Complaint with Exhibit of the United States District Court for the Central District of California Dated October 24, 1994 ..... 25a

Petitioner, Robert Murray dba America Speaks, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 86 F.3d 858 (9th Cir. 1996) and the slip opinion is reproduced in the Appendix filed herewith ("App.") at App. B at 2a. The order of the United States Court of Appeals for the Ninth Circuit is reproduced at App. A at 1a. The orders of the district court in this case are reproduced at App. C at 10a and App. D at 17a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed and entered judgment on this matter on June 18, 1996. Murray, petitioner herein, then filed with the Ninth Circuit a petition for rehearing and suggestion of rehearing en banc. On August 9, 1996 the Ninth Circuit filed an order denying the petition for rehearing and rejecting the suggestion for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII:

> [I]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

15 U.S.C. § 1114:

> (1) Any person who shall, without the consent of the registrant—
>
> > (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . .
>
> shall be liable in a civil action by the registrant for the remedies hereinafter provided. . . .

STATEMENT OF THE CASE

Petitioner, Robert Murray dba America Speaks (hereinafter "Murray"), is the owner of Federal Service Mark Registration No. 1,832,403 for America Speaks for market research and analysis. (ER 38).[1] Murray is engaged in the business of providing video consumer survey and polling interviews under the America Speaks service mark and has the exclusive right to use the America Speaks service mark in the United States. (ER 31, ¶6).

Murray, is a nationally recognized figure in the field of polling and surveying, having gained recognition for his polling surveys as the Shell Question Man and surveys for Maxwell House instant coffee. Murray's polls and surveys are aired on

1. Pages references "ER __" are to the excerpts of the record below.

broadcast television. Thus, America Speaks enjoys substantial goodwill with the American public. (ER 31, ¶5).

On July 4, 1994, respondent, Cable National Broadcasting Company (hereinafter "CNBC"), launched an all-tal . cable television network, named America's Talking. Services offered by CNBC under the America's Talking mark include national polling surveys. Using said service mark, CNBC has conducted and distributed survey data to the news media which has broadcast the data as an America's Talking poll. Murray is specifically aware of at least one such poll relating to the O.J. Simpson matter that has been broadcast on the television news. CNBC intends to release additional polling and survey data under the America's Talking mark as a regular business practice. (ER 31-32, ¶7).

Murray's America Speaks marketing surveys and polls are provided to his clients for use in commercial television. CNBC offers its polling services under the America's Talking mark through the same commercial channels of trade in the television industry. (ER 32, ¶8).

CNBC is using its America's Talking mark in conjunction with interactive polling services whereby television viewers respond to polling questions by calling telephone numbers that correspond to the viewer's answer. Prior to CNBC's entry into this field, Murray had identified interactive polling services as an intended area of expansion for America Speaks and had informed business associates of such plans. America Speaks will be expanding into the interactive polling market in the foreseeable future. (ER33, ¶12.5).

CNBC's use of the confusingly similar mark, America's Talking, in the same field as Murray's America Speaks will cause confusion among buyers of the services, as well as

confusion among members of the public who view the respective marks, regardless of whether or not they were purchasers of the services. (ER 33-34, ¶ 12.6).

CNBC's mark, America's Talking, infringes on Murray's America Speaks service mark and consumer confusion, including reverse confusion, is likely to occur.

The case below was filed by Murray for trademark infringement, false designation of source and unfair competition against defendant, CNBC. CNBC's motion to dismiss the original complaint was heard and granted with leave to amend on September 26, 1994. *See* App. D, 17a. An amended complaint was filed on October 24, 1994. *See* App. F, 25a. CNBC then filed a Rule 12(b)(6) motion to dismiss the amended complaint. The District Court granted CNBC's motion to dismiss without leave to amend by ruling, *as a matter of law*, that Murray's and CNBC's services were unrelated and thus, there could be no likelihood of confusion as a matter of law. *See* App. C, 10a. The District Court failed to provide any analysis of the relevant factors identified by the Ninth Circuit for determining the likelihood of confusion of two marks, including the sub-issue of relatedness.

On January 9, 1995, Murray filed a timely appeal from the District Court's order granting CNBC's Rule 12(b)(6) motion to dismiss the amended complaint with prejudice. After ordering submission of the case on June 4, 1996, *without oral argument,* the Ninth Circuit affirmed the decision of the District Court on June 18, 1996, and published its decision. *See* App. B, 2a.

The petitioner, Murray, then filed a petition for rehearing and suggestion for rehearing en banc. The rehearing request was primarily based on the fact that during the pendency of the

appeal, the United States Supreme Court issued its decision in *Markman v. Westview Instruments, Inc.*, __ U.S. __, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996). The decision pertained directly to the question presented, that is, whether the issue of likelihood of confusion can be decided as a matter of law. As oral argument was not permitted in the present case, petitioner was foreclosed from bringing this important decision to the Circuit's attention during the appellate court's original review.

On August 9, 1996 in response to petitioner's request for rehearing, the Ninth Circuit issued an order and an amendment to its original opinion. In so doing the Circuit denied both petitioner's rehearing request and his suggestion for rehearing en banc. *See* Order at App. A, 1a.

For these reasons, petitioner's Writ of Certiorari should be granted. The decision of the Ninth Circuit below directly conflicts with other Circuit Court decisions on the issue of whether likelihood of confusion is a legal question to be decided as a matter of law or is a fact question to be decided by a jury. This issue is of critical importance to the District Courts, the intellectual property bar, and untold numbers of litigants. A review by this Court will provide a uniform and clear definition of the law in this area.

REASONS FOR GRANTING THE WRIT

This Court should issue the writ in this matter for the following reasons:

First, to correct the Ninth Circuit's failure to follow this Court's holding in *Markman v. Westview Instruments, Inc.*, __ U.S. __, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996). In *Markman,* this Court held that the question of infringement of an intellectual property right is one of fact reserved exclusively

for the jury under the Seventh Amendment. In the case of *Cass County Music Company v. C.H.L.R. Inc.*, 88 F.3d 635, 644 (8th Cir. 1996), the Eighth Circuit relied upon *Markman* to extend Seventh Amendment protections to copyright cases. In direct conflict with this line of cases, the Ninth Circuit has held that a judge may make the determination of trademark infringement as a matter of law, thereby depriving federal trademark owners of their constitutional right to a jury trial. As such, this Court must make a clear statement that the Ninth Circuit has failed to follow the established law in this area.

Second, to resolve the current inter-Circuit conflict which currently exists between the Ninth Circuit and several other Circuits including the Second, Fourth, Seventh and Eighth. This conflict exists because the Ninth Circuit's holding in this case, which states that a judge may make the determination of trademark infringement, is in direct conflict with other Circuit decisions, such as *American Intern. Group, Inc. v. London Am. Intern.*, 664 F.2d 348, 352 (2nd Cir. 1981), which hold that determination of trademark infringement is a question of fact for the jury. This conflict should be resolved in accordance with this Court's *Markman* holding that a question of infringement is factual and one to be resolved by a jury.

Finally, this writ should be issued to reverse the Ninth Circuit's error in dismissing the petitioner's cause of action for reverse confusion. The Ninth Circuit has wrongly affirmed the trial court's dismissal of petitioner's claim on the grounds that the Ninth Circuit has never recognized a cause of action for reverse confusion which is in conflict with the law of other Circuits. This Court should decide whether a cause of action does or does not exist under the Lanham Act for trademark infringement based upon reverse confusion.

I.

THIS COURT'S DECISION IN *MARKMAN*, HOLDING THAT THE SEVENTH AMENDMENT GUARANTEES PATENT OWNERS A RIGHT TO A JURY TRIAL ON THE ISSUE OF PATENT INFRINGEMENT, SHOULD BE EXTENDED TO GUARANTEE TRADEMARK OWNERS THE RIGHT TO A JURY TRIAL ON THE ISSUE OF TRADEMARK INFRINGEMENT.

A. The Right To A Jury Trial In A Trademark Case Is No Different Than The Right To A Jury Trial In A Patent Or A Copyright Case.

On April 23, 1996, this Court issued its landmark opinion in the case of *Markman v Westview Instruments, Inc.*, __ U.S. __, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996). The *Markman* decision was a case of first impression that defined the scope of a plaintiff's Seventh Amendment right to a jury trial in patent cases. In *Markman*, this Court held that although the trial court has a duty to define the scope of the plaintiff's patent claims, the issue of whether those patent claims are infringed is a jury question protected by the Seventh Amendment right to a jury trial. The analysis in *Markman* is clearly applicable to any intellectual property case alleging infringement, including the infringement of Murray's federal service mark registration in the present case.

Here, the dismissal of Murray's complaint was affirmed because the Ninth Circuit concluded that the television polling services offered by Murray and the television polls conducted by the respondent were not sufficiently related to cause a likelihood of confusion. This conclusion was a clear violation of Murray's Seventh Amendment right to a jury trial, as defined in *Markman*, for the following reasons:

There is a direct parallel between the federal patent rights addressed in *Markman* and the federal trademark rights in the present case. In the case of a patent, the patent claims define the scope of protection granted by the plaintiff's patent. A patent claim is a word fence that is placed around the invention. *Markman* holds that defining the patent claim is the responsibility of the trial judge because judges are better suited to interpret the construction of a written instrument and because it is important for patent claims to be interpreted consistently from case to case. However, *Markman* also held that once the claim is interpreted, the issue of whether the claim is *infringed* is a question for the jury. The inherent distinction between defining the scope of a patent claim and determining whether the claim is infringed is that the patent claim is defined without any reference at all to the infringer's product. The property lines drawn by the patent claims exist regardless of whether there are any squatters on the property or not.

Applying the holding in *Markman* to a federal trademark case, it is clear that the trial court may resolve questions concerning the interpretation of the federal trademark registration but the issue of whether the mark is *infringed* is a jury question protected by the Seventh Amendment. Just as in a patent case, the interpretative role of the trial court ends as soon as one compares the plaintiff's mark with the allegedly infringing mark. At that point, the analysis necessarily crosses over the line into the arena of infringement. In accordance with *Markman*, the plaintiff has a Seventh Amendment right to have the issue of infringement decided by a jury. This conclusion is consistent with Ninth Circuit precedent in which the Ninth Circuit has repeatedly held that trademark infringement, specifically the issue of likelihood of confusion (including the relatedness and proximity of the goods), is *an issue of fact. Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1355 (9th Cir. 1985) (en banc); *General Conf. Corp. v. Seventh-Day Adventist*

Ch., 887 F.2d 228, 231 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079, 110 S. Ct. 1134, 107 L. Ed. 2d 1039 (1990); *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 845 (9th Cir. 1987); and *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1391 (9th Cir. 1993). Yet, the Ninth Circuit's decision grants trial judges the right to decide the factual issues of infringement *as a matter of law*. This is a violation of the Seventh Amendment. Trial courts have no special insight into the minds of ordinary consumers which makes them better suited to decide whether services are sufficiently related to result in a likelihood of confusion. That is a jury function. The trial court clearly exceeded its constitutional authority when it found it had the power to decide the issue as a matter of law.

Extending the holding in *Markman* to other forms of intellectual property has already occurred in the lower courts. For example, the Seventh Amendment guaranty to a jury trial, established in *Markman*, was extended to copyright cases in *Cass County Music Company v. C.H.L.R. Inc.*, 88 F.3d 635, 644 (8th Cir. 1996). In *Cass* the plaintiff brought suit for copyright infringement of several songs which the defendant had played at its comedy club without a performance license. In reversing the trial court's decision to strike the defendant's jury demand, the Eighth Circuit held that "patent and copyright infringement actions are sufficiently analogous to conclude that, as patent infringement is a legal action to be tried to a jury, so is copyright infringement." *Id.* at 642. In support of its holding, the court noted that the Seventh Amendment provides a right to a jury trial in suits where the rights and remedies adjudicated are legal rather than equitable. The Seventh Circuit concluded that copyright cases, like patent cases, are such legal actions. In reaching its holding the *Cass* court relied heavily on this Court's *Markman* decision, stating "[t]he Supreme Court treats patent and copyright the same when looking at the purposes behind the constitutional provision and the laws thereby

enacted." *Id.* at 641. The Eighth Circuit also noted, "the elements that must be proven for liability to attach in patent and copyright cases are functionally the same." *Id.* at 642. Other Circuits addressing substantially the same have also reached the same conclusion. *See Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119 (4th Cir. 1981); *Video Views, Inc. v. Studio 21, Ltd*, 925 F.2d 1010, 1017 (7th Cir.), *cert. denied*, 502 U.S. 861, 112 S. Ct. 181, 116 L. Ed. 2d 143 (1991). There is no legal reason for trademark infringement to be treated any differently.

Therefore, it is clear that infringement, whether that of a patent, copyright or trademark, is a factual determination to be made by a jury. The similarities and parallels which justify the application of *Markman* to copyright infringement in *Cass* also justify the extension of *Markman* to trademark infringement cases.

This Court emphasized the need for uniform application of law in this area in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162, 109 S. Ct. 971, 983, 103 L. Ed. 2d 118 (1989) when the Court admonished "[o]ne of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to **promote national uniformity in the realm of intellectual property**." (emphasis added). For this reason as well, trademark cases should be given the same protection guaranteed in *Markman* and *Cass*.

B. Seventh Amendment Historical Analysis Of Infringement Suits.

The Supreme Court in *Markman* conducted a historical analysis of the right to a jury trial in patent cases. Likewise, the Eighth Circuit in *Cass* supported its ruling by reviewing the historical right to jury cases in copyright cases. The analogy between *Markman*, *Cass* and trademark cases also extends to

the historical analysis. The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." United States Constitution Amendment VII. The right of trial by jury is the right which existed under English common law when the Amendment was adopted. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657, 55 S. Ct. 890, 891, 79 L. Ed. 1636 (1935). The determination of whether a right to jury trial existed in relation to a specific cause of action or issue when the Amendment was adopted is an historical test. In *Markman, supra,* this Court identified two questions for the test:

> [W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was . . . If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.

116 S. Ct. at 1389 (citations omitted).

With respect to infringement cases, the Court answered the first question in the affirmative. The Court instructed, "there is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago." *Id.* at 1389 (citation omitted). The present case, like *Markman*, involves the infringement of an intellectual property right. In *Markman*, a patent was infringed. In the present case, a trademark was infringed.

The second question this Court asked requires more of a

detailed historical analysis. In *Markman*, this Court reviewed several cases from the early 1800's and relied on the writings of Justice Benjamin Robbins Curtis. The Court held that determining whether infringement occurred, " 'is a question of fact, to be submitted to a jury.' " *Id.* at 1393; 1 *A Memoir of Benjamin Robbins Curtis, L.L.D.*, 84 (B. Curtis ed. 1879). Justice Curtis stated that the two basic elements of a patent case were construing the patent and determining whether infringement occurred. *Id.* at 1393 (citing 1 *A Memoir of Benjamin Robbins Curtis, L.L.D.*, 84 (B. Curtis ed. 1879); *cf. O'Reilly v. Morse*, 15 How. 62, 63, 14 L. Ed. 601 (1854)). The *Cass* court followed *Markman*'s lead and applied the same historical analysis to copyright infringement. The Eighth Circuit concluded that "patent and copyright infringement actions are sufficiently analogous to conclude that, as patent infringement is a legal action to be tried to a jury, so is copyright infringement." *Cass, supra*, 88 F.3d at 642.

Cases regarding causes of action similar to modern trademark infringement or unfair competition date back as far as 1618. 1 *McCarthy On Trademarks and Unfair Competition* § 5.02 (hereinafter cited as *McCarthy*). The first recorded use of the term "unfair competition" was by Lord Eldon in 1803. *Id.* By the 1850's, common law rules against passing off and trademark infringement were well-accepted. *Id.* In the *Trademark Cases*, 100 U.S. 82, 92, 25 L. Ed. 550, 551 (1879) this Court instructed:

> The right to adopt and use a symbol or device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of the use of that symbol by all other persons, has long been recognized by the common law and the chancery courts of England and of this country, and by the

> statutes of some of the States. It is a property right, for which damages may be recovered in an action at law and the violation of which will be enjoined by a court of equity, with compensation for past infringement.

The issue of infringement of intellectual property rights, in general, has long been recognized in Anglo-American common law and its resolution has been left to juries. The distinction between patents and trademarks is immaterial when considering the role of the jury in determining infringement. In *Gorham Mfg. Co. v. White*, 81 U.S. 511, 524, 20 L. Ed. 731, 736 (1872), this Court, in dealing with a case that combined both infringement of a design patent and palming off of goods, admonished: "The sole question, therefore, is one of fact. Has there been an infringement?" Hence, historically, this Court has not distinguished between infringement of patents and infringement of trademarks — both are issues of fact for the jury.

C. The Seventh Amendment Guarantees That Issues Of Fact Shall Be Tried By A Jury.

It is well settled that issues of fact are to be determined by a jury. This Court explicitly instructs, "issues of law are to be decided by the court and issues of fact are to be determined by the jury under appropriate instructions from the court." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657, 55 S. Ct. 890, 891, 79 L. Ed. 1636 (1935). The division of roles between judge and jury is axiomatic to the Seventh Amendment right to a jury trial.

The jury is well-suited to the role of fact-finder. As this Court observed in *Miller v. Fenton*, 474 U.S. 104, 113-114, 106 S. Ct. 445, 451, 88 L. Ed. 2d 405 (1985), "the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed

question of law and fact' is sometimes as much a matter of allocation as it is of analysis . . . the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." This Court has repeatedly and expressly allocated the role of the fact-finder to the jury. In *C.I.R. v. Duberstein*, 363 U.S. 278, 289, 80 S. Ct. 1190, 1198-99, 4 L. Ed. 2d 1218 (1960), this Court identified the type of situation necessitating adjudication by the fact-finder:

> Decisions . . . must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity for ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.

Hence, the jury's fact-finding role in a suit for infringement is based upon its superior ability to evaluate the factors identified in *Duberstein*.

D. The District Court's And The Ninth Circuit's Decisions Deny Murray His Seventh Amendment Right To A Jury Trial On The Issue Of Infringement.

As stated by the Ninth Circuit in the present case, to

maintain an action for trademark infringement, a plaintiff must prove the defendant's use of the same or similar mark would create a likelihood of consumer confusion. An eight factor test is employed to determine whether a "likelihood of confusion" exists. *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1391 (9th Cir. 1993). Several factors focus, *inter alia*, on the sub-issue of relatedness of the goods or services because, if goods or services are totally unrelated, confusion is unlikely and there is no infringement. *AMF v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979).

Without permitting Murray to prove his allegation of relatedness, both the Ninth Circuit and the District Court, stated that the parties' services are unrelated as a matter of law. The District Court and the Court of Appeals failed to apply the facts, as alleged by Murray, to the eight factors cited in *Official Airline Guides, Inc.*, *See* ER 11-13 and Opinion of the Ninth Circuit, App. B, 2a. Instead, both courts summarily conclude that the parties' services are unrelated. *See* Opinion at App. B, 8a. This is a clear error under *Markman* and a violation of Murray's Seventh Amendment right to a jury trial on factual issues.

As is stated in *Duberstein, supra*, a jury is uniquely suited to the resolution of nontechnical, factual issues which relate to the variety of human experience represented by a jury. Factors such as intent, similarity of marks, likelihood of expansion, and proximity of goods are exactly the type of non-technical issues which the Seventh Amendment reserves for a jury to decide.

A decision regarding the relatedness of goods is, by definition, a case-by-case analysis. Consideration of the competing goods or services at issue, in light of the eight factor test in *Official Airline Guides, Inc.*, is required. Uniformity of decision and the establishment of set rules for determining the

relatedness of goods, therefore, cannot be expected to carry over into other disputes, as is necessary in patent claim interpretation. For example, Allstate insurance and Allstate driving school were held to be sufficiently related for a likelihood of confusion to exist while Allstate insurance and Allstate mortgage brokerage were not. *Sears, Roebuck & Co. v. Johnson*, 219 F.2d 590 (3rd Cir. 1955) and *Allstate Ins. Co. v. Allstate Invest. Corp.*, 210 F. Supp. 25 (W.D. La. 1962), *aff'd*, 328 F.2d 608 (5th Cir. 1964). Clearly, relatedness is an issue for the jury to decide.

In *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974), this Court explained the role of a federal court in reviewing a complaint on a motion to dismiss:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. *The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims*. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

(Emphasis added). This Court instructs, "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957) (*quoting* Federal Rule of Civil Procedure, Rule 8(a)).

Murray alleges facts regarding six of the eight factors: Strength of Mark (ER 31, ¶¶ 5 and 6), Proximity of goods (ER

31, ¶¶ 6 and 7, 8), intent of the defendant (ER 32, ¶ 9), marketing channels (ER 32, ¶¶ 8 and 12), similarity of the marks (ER 31, ¶ 12), and likelihood of expansion of product lines (ER 33, ¶ 12.5).

The District Court and the Ninth Circuit did not consider whether Murray had alleged facts related to the eight factor test. *See* Opinion at App. B, 2a. Instead, the District Court and the Ninth Circuit ignored what Murray had pled and focused on what he had not pled. This Court in *Conley* admonished, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley, supra,* 355 U.S. at 47-48, 78 S. Ct. at 103. Here, both courts made a judgment on Murray's ability to prove infringement and impinged the constitutionally mandated province of the jury.

As shown above, trademark infringement hinges on the existence of a likelihood of confusion between two marks. A jury, pursuant to the Seventh Amendment, is the sole arbiter of the issue of infringement and the issue of likelihood of confusion. Both courts, in deciding the sub-issue of relatedness before any evidence could be presented, took the issue of infringement from the jury and violated Murray's Seventh Amendment rights as defined by this Court's decision in *Markman* and Seventh Amendment jurisprudence.

II.

THIS COURT SHOULD RESOLVE THE CURRENT INTER-CIRCUIT CONFLICT CREATED AS A RESULT OF THE NINTH CIRCUIT'S HOLDING THAT TRADEMARK INFRINGEMENT IS AN ISSUE OF LAW, WHICH IS IN DIRECT CONFLICT WITH OTHER CIRCUITS THAT HOLD THAT TRADEMARK INFRINGEMENT IS AN ISSUE OF FACT.

Several Circuits hold that the likelihood of confusion is an issue of fact that cannot be decided on the pleadings and/or is an issue properly submitted to a jury. The Second Circuit in *American Intern. Group, Inc. v. London Am. Intern.*, 664 F.2d 348, 352 (2nd Cir. 1981) specifically admonished that determination of the sub-issue of proximity of services, which is one of the eight factors, was an issue of fact and that "[i]n reaching this conclusion, the district court appears to have resolved the factual question, and in so doing it exceeded its authority on a motion for summary judgment."

In the Third Circuit, likelihood of confusion is a question of fact. *Country Floors v. Partnership of Gepner and Ford*, 930 F.2d 1056, 1063 (3rd Cir. 1991). In *Country Floors*, the Third Circuit instructed on the issue of the relevant customer market, "the district court's determination of this question of customer-type in favor of the partnership was a major underpinning of its decision that confusion was not likely. The district court should not have resolved this point, *because it presents a genuine issue of material fact.*" *Country Floors, supra*, 930 F.2d at 1066.

In the Seventh Circuit, the ultimate conclusion on the likelihood of confusion is a finding of fact. *AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611, 616 (7th Cir. 1993).

Moreover, the Seventh Circuit holds, "the plaintiff need not prove each and every factor in order to prevail. . . . The weight and totality of the most important factors in each case will ultimately be determinative of the likelihood of confusion . . ." *Schwinn Bicycle Co. v. Ross Bicycles, Inc.*, 870 F.2d 1176, 1187 (7th Cir. 1989).

Hence, the law of several Circuits supports the holding that the likelihood of confusion is an issue of fact reserved for the jury. The decisions in the Second, Third and Seventh Circuits are, thus, in direct conflict with the Ninth Circuit's decision in this case and Supreme Court review is proper and necessary to resolve this conflict.

III.

REVERSE CONFUSION IS A PROPER GROUND UPON WHICH TO STATE A CAUSE OF ACTION FOR TRADEMARK INFRINGEMENT UNDER THE LANHAM ACT.

In its decision, the Ninth Circuit made it clear that it "has not yet formally recognized a cause of action for reverse confusion, although the theory was referenced in *Americana Trading, Inc. v. Russ Berrie & Co.*, 966 F.2d 1284, 1287 (9th Cir. 1992)." *See* Opinion at App. B, 9a. However, reverse confusion as an actionable harm has long been recognized. *See* Justice Holmes' dissent in *International News Service v. Associated Press*, 248 U.S. 215, 247, 39 S. Ct. 68, 75, 63 L. Ed. 2d 211 (1918). The model case for reverse confusion is *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977). The Tenth Circuit ruled that an instruction on likelihood of confusion properly encompassed the public's incorrect belief that a junior user of a mark is the

source of a mark. The Tenth Circuit stated, "Big O does not claim nor was any evidence presented showing Goodyear intended to trade on the goodwill of Big O or to palm off Goodyear products as being those of Big O. Instead, Big O contends Goodyear's use of Big O's trademark created a likelihood of confusion concerning the source of Big O's 'Big Foot' tires." *Big O, supra*, 561 F.2d at 1371.

Murray alleges identical facts in his amended complaint. (ER 33, ¶ 12). Murray alleges America Speaks and America's Talking are confusingly similar service marks, the services are related with regard to polling, and that CNBC's superior resources create the strong likelihood that reverse confusion will occur. *Id.* In the panel's opinion, the Ninth Circuit held that Murray failed to allege CNBC saturated the market with advertising or that actual confusion occurred. Opinion at App. B, 9a. However, neither of these facts need be alleged. As the Tenth Circuit expressly upheld, "The test is *not one of actual confusion*; it is the likelihood of confusion." *Big O, supra*, 561 F.2d at 1371 (*quoting* District Court's instruction).

As is stated above, a likelihood of confusion was properly alleged by Murray and the issue was improperly resolved as an issue of law by the District Court. In particular, Murray alleges that, prior to CNBC's entry into the field, Murray expressed his intent to expand into the interactive polling market. (ER 33, 112.5). The Seventh Circuit instructs, "Protecting the trademark owner's interest in capitalizing on the goodwill associated with its mark by moving into new markets is especially compelling *in the context of a reverse confusion case* . . ." *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 958 (emphasis added). Hence, Murray has gone beyond normal notice pleading to allege the specific facts which give rise to a claim for reverse confusion.

Therefore, petitioner should be allowed to maintain his lawful cause for reverse confusion of its service mark.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted and the writ issued.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 9, 1996

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55090

D.C. No. CV-94-05175-DT

ROBERT NMI MURRAY, dba: AMERICA SPEAKS,

Plaintiff-Appellant,

v.

CABLE NATIONAL BROADCASTING COMPANY, dba: AMERICA'S TALKING,

Defendant-Appellee.

ORDER

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 18, 1996

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-55090

D.C. No. CV-94-05175-DT

ROBERT NMI MURRAY, dba: AMERICAN SPEAKS,

Plaintiff-Appellant,

v.

CABLE NATIONAL BROADCASTING COMPANY, dba: AMERICA'S TALKING,

Defendant-Appellee.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Submitted June 4, 1996**
Pasadena, California

Filed June 18, 1996
Amended August 6, 1996

** The panel fmds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

Appendix B

Before: Jerome Farris, Ferdinand F. Fernandez and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

* * *

COUNSEL

R. Joseph Trojan, Trojan Law Offices, Beverly Hills, California, for the Plaintiff-appellant.

R. Hartman, National Broadcasting Company, Burbank, California, for the defendant-appellee.

ORDER

The Opinion filed June 18, 1996, is amended as follows:

At slip opinion page 7062, delete the following beginning on line 15:

> A panel of this court cannot overrule a prior decision of this court. *See, e.g., United States v. Camper,* 66 F.3d 229, 232 (9th Cir. 1995). However, we need not rest on this rule because *Toho* and *Levi Strauss* are entirely compatible.

The following should be inserted in lieu thereof:

> Murray asks us to do what we cannot: overrule a prior decision of this court.

Appendix B

"[O]nly a panel sitting en banc may overturn existing Ninth Circuit precedent." *United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995). Nor did *Levi Strauss* overrule *Toho*.

OPINION

THOMAS, Circuit Judge:

Robert Murray ("Murray") contends CNBC, Inc. ("CNBC") improperly infringed on his registered trademark "America Speaks" by conducting opinion polling through its cable network "America's Talking." The district court dismissed Murray's complaint for trademark infringement, false designation of origin and unfair competition. We affirm.

BACKGROUND

Murray videotapes "man-on-the-street" surveys for business clients. He has conducted surprise supermarket interviews for Maxwell House instant coffee and performed consumer surveys as the "Shell Question Man." Murray alleges he obtained a federal service mark registration for "America Speaks" and has operated his market research business under that name since October, 1992.

In July 1994, CNBC commenced a cable television network entitled "America's Talking." Murray contends the America's Talking network conducts interactive national polling surveys and distributes survey data to the news media. Although Murray has not conducted any interactive surveys, he claims he will in the future under the name "America Speaks" and had planned to do so prior to CNBC's use of interactive polling on America's Talking. Murray contends CNBC's use of

interactive surveys is likely to cause confusion when he expands his "America Speaks" business to include interactive surveys.

Murray sued CNBC for violation of 15 U.S.C. § 1114 (trademark infringement), 15 U.S.C. § 1125(a) (false designation of origin) and California unfair competition law. CNBC moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted the motion, but allowed Murray leave to amend his complaint. Murray filed an amended complaint and CNBC renewed its motion to dismiss. The district court granted the motion, finding as a matter of law that the services provided by CNBC and Murray were unrelated and there was no likelihood of consumer confusion.

Murray raises three issues on appeal: (1) whether this Court should overrule *Toho Co. Ltd. v. Sears, Roebuck & Co.*, 645 F.2d 788, 790-791 (9th Cir. 1981) as contradictory to *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1355 (9th Cir. 1985) (en banc); (2) whether the district court erred in finding there was no likelihood of trademark confusion as a matter of law and (3) whether Murray alleged sufficient facts to support a claim of reverse confusion.

STANDARD OF REVIEW

We review *de novo* dismissal of a complaint for failure to state a claim. *Oscar v. University Students Co-operative Assn.*, 965 F.2d 783, 785 (9th Cir.), *cert. denied* 506 U.S. 1020, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992). Murray suggests that *Levi Strauss*, 778 F.2d at 1356, requires application of the clearly erroneous standard. However, in trademark confusion cases, the clearly erroneous standard applies when the district court

has made a factual and legal determination of likelihood of confusion based on submitted evidence or stipulated facts. *Id.* *De novo* review is appropriate when the district court has found as a matter of law that the plaintiff s complaint fails to state a claim upon which relief may be granted. *Maljack Productions, Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 885 (9th Cir. 1996).

DISCUSSION

Likelihood of Tradenmrk Confusion as a Matter of Fact or Law

To maintain an action for trademark infringement under 15 U.S.C. § 1114, false designation of origin under 15 U.S.C. § 1125 (a) and unfair competition under California law, a plaintiff must prove the defendant's use of the same or similar mark would create a likelihood of consumer confusion. *Levi Strauss*, 778 F.2d at 1354 (federal claims); *Tomlin. v. Walt Disney Productions*, 18 Cal.App.3d 226, 235, 96 Cal. Rptr. 118, 123 (1971) (California claims). An eight factor test is employed to determine whether a "likelihood of confusion" exists. *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1391 (9th Cir. 1993). If the court determines as a matter of law from the pleadings that the goods are unrelated and confusion is unlikely, the complaint should be dismissed. *Toho*, 645 F.2d at 790-791.

Murray argues this Court must overrule *Toho* because "the underlying premise of the decision, namely that the issue of likelihood of confusion can be an issue of law, was expressly rejected by the Ninth Circuit when it decided that likelihood of confusion was an issue of fact in *Levi Strauss.*" He argues *Levi*

Strauss requires all trademark confusion cases to be resolved by a jury. We disagree.

Murray asks us to do what we cannot: overrule a prior decision of this court. "[O]nly a panel sitting en banc may overturn existing Ninth Circuit precedent." *United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995). Nor did *Levi Strauss* overrule *Toho*. In *Toho*, we held the use of "BAGZILLA" on garbage bags was unrelated as a matter of law to the protected literary and toy merchandising of "GODZELLA" and upheld the district court's dismissal for failure to state a claim. *Toho*, 645 F.2d at 790. *Levi Strauss* unified the standard of review in trademark confusion cases and held that findings of likelihood of confusion should be reviewed under the clearly erroneous standard. 778 F.2d at 1356. Previously, the standard of review differed depending on whether the district court had entered findings based on disputed or undisputed facts. *Id. Levi Strauss* does not preclude the district court from determining likelihood of confusion as a matter of law, either through dismissal or summary judgment. *See Newton v. Thomason*, 22 F.3d 1455, 1459 (9th Cir. 1994).

The District Court's Deterniination of No Likelihood of Confusion

Murray contends that the district court erred in finding the "America Speaks" and "America's Talking" service marks were unrelated and there was no likelihood of consumer confusion as a matter of law.

A likelihood of confusion exists when a consumer viewing a service mark is likely to purchase the services under a mistaken belief that the services are, or associated with, the

services of another provider. *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987). The confusion must "be probable, not simply a possibility." *Id.* If goods or services are totally unrelated, there is no infringement because confusion is unlikely. *AMF v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979).

Taking the facts alleged by Murray to be true, we agree with the district court that the parties' services are unrelated and there is no likelihood of confusion. Murray conducts "man-on-the-street" consumer surveys and sells his services to business clients for use in television commercial advertising. He does not produce network television programming. By contrast, CNBC's "America's Talking" network offers talk-show television programming to cable television viewers. CNBC's "polling" consists of allowing viewers to respond to questions by calling telephone numbers, the results of which are occasionally distributed to the news media. Murray does not allege CNBC has conducted polling or market analysis for advertisers or related to commercial products. He does not claim CNBC has ever sold any polling or marketing services to anyone. In fact, Murray does not contend he and CNBC share any customers or potential customers. Because the parties' services are unrelated, there is no likelihood of consumer confusion as a matter of law. *See Toho*, 645 F.2d at 790-791.

Reverse Confusion Claim

Reverse confusion occurs when a trademark infringer so saturates the market with promotion of his trademark that consumers come to believe that the infringer, rather than the plaintiff, is the source of the trademarked product. *Libman Co. v. Vining Industries*, 69 F.3d 1360, 1362 (7th Cir. 1995), *cert.*

denied, 64 U.S.L.W. 3709 (June 3, 1996). This Circuit has not yet formally recognized a cause of action for reverse confusion, although the theory was referenced in *Americana Trading, Inc. v. Russ Berrie & Co.*, 966 F.2d 1284, 1287 (9th Cir. 1992).

Murray failed to allege sufficient facts to state a claim for reverse confusion under the Lanham Act. He does not contend that CNBC saturated the market with advertising concerning its interactive polling activities. He does not argue that anyone has confused CNBC for the "Shell Answer Man" or mistakenly asked CNBC to conduct surprise interviews of Maxwell House coffee drinkers. Because Murray has failed to plead a cognizable claim for reverse confusion, we need not reach the issue of whether, and under what circumstances, this Circuit will recognize a theory of reverse confusion.

AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED DECEMBER 12, 1994

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 94-5175 DT (CTx)

ROBERT MURRAY, an individual, d.b.a., AMERICA SPEAKS,

Plaintiff,

vs.

CABLE NATIONAL BROADCASTING, COMPANY, a corporation, d.b.a., AMERICA'S TALKING, INC.,

Defendants.

ORDER **GRANTING** DEFENDANT CNBC'S MOTION TO DISMISS WITH PREJUDICE AND WITHOUT LEAVE TO AMEND PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b) (6).

Background

1. *Factual Background.*

This action stems from an alleged trademark infringement. Plaintiff Robert Murray ("Murray") registered the trademark "America Speaks" for market research and analysis. Amended Complaint, ¶ 6. Murray personally interviews consumers for corporate clients in his "man-on-the-street" video surveys and polling services. Amended Complaint, ¶ 6. Murray then

provides the interviews to his corporate clients for use in their television commercials. Amended Complaint, ¶ 8. These interviews have made Murray a well-recognized figure. Amended Complaint, ¶ 5.

"America's Talking" is an "all-talk cable television network" owned by Defendant CNBC, Inc. (improperly sued as Cable National Broadcasting Company, Inc.). Amended Complaint, ¶ 7. CNBC has distributed survey data on topics of public interest to the news media under the service mark "America's Talking" and television news shows have broadcast the data as an "America's Talking" poll. Amended Complaint, ¶ 7. CNBC's America's Talking" also conducts interactive polling services whereby television viewers dial a telephone number that corresponds to the viewer's answer to the particular poll. Amended Complaint, ¶ 12.5. CNBC also intends to release additional polling and survey data under the "America's Talking" mark. Amended Complaint, ¶ 7.

Murray claims the use of the mark "America's Talking" infringes on his "America Speaks" trademark. Murray claims that "America's Talking" has conducted and reported on a newsworthy "public interest" poll and consumer confusion is likely to occur.

2. ***Procedural History.***

CNBC's Motion to Dismiss the original Complaint was heard and granted with leave to amend on September 26, 1994. On October 24, 1994, Murray filed the Amended Complaint. On November 16, 1994, CNBC filed a new Motion to Dismiss Plaintiff's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This Motion is presently before this Court.

Appendix C

Discussion

A. STANDARD

In considering a motion a dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume that the Plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *United States v. City of Redwood City,* 640 F.2d 963, 967 (9th Cir. 1981). Moreover, even if the face of the pleadings indicates that recovery is unlikely, the plaintiff is still entitled to offer evidence in support of the complaint. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Redwood City,* 640 F.2d at 967. Finally the court may not dismiss complaints pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Russel v. Landrieu,* 621 F.2d 1037, 1039 (9th Cir. 1980).

This Court previously ruled that to maintain his causes of action for trademark infringement (15 U.S.C. § 1114) and false designation of origin (15 U.S.C. § 1125 (a), Murray must show that CNBC'S use of the same or similar mark is likely to cause consumer confusion, mistake or deception. *Levi Strauss & Co. v. Blue Bell, Inc.,* 778 F.2d 1352, 1354 (9th Cir. 1985); *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church,* 887 F.2d 228, 231 (9th Cir. 1989). This Court also previously ruled that under California law, the likelihood of confusion is also the test for an unfair competition action. *Tomlin v. Walt Disney Productions,* 18 Cal. App.3d 226, 235, 96 Cal. Rptr. 118 (1971). The *General Conference* court set forth the following eight-part test for determining whether there was a likelihood of confusion

between two marks: (1) strength of the registered service mark; (2) The proximity of the goods; (3) the similarity of the competing service marks; (4) the evidence of actual confusion; (5) market channels used; (6) the type of goods and degree of care exercised by the purchasers; (7) defendant's intent; and (8) the likelihood of expansion of product lines. 887 F.2d at 231. When it is clear from the application of this test that confusion is not likely, the action should be dismissed. *Toho v. Sears, Roebuck & Co.*, 645 F.2d 788,790-791 (9th Cir. 1981) (action dismissed for failure to state a claim where both the marks "Godzilla" and "Bagzilla" and the goods they identified were different).

This Court must view the trademark in its entirety, as it appears in the marketplace and cannot dissect the mark into parts. *California Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1455 (9th Cir. 1985). The *California Cooler* court held that "a composite geographic mark should not be dissected into its parts to determine whether it is primarily geographical or not. It is the likely reaction of customers to the total mark that is at issue." (Citation omitted). *Id.* at 1455. The Supreme Court has held that use of the mark "American" did not render "American Girl" geographically descriptive and upheld the finding of infringement of "American Girl" by the mark "American Lady". *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 256-259 (1916). The courts have found the following marks confusing: "Arise" and "Awake" for breakfast drinks; "Beauty-Rest" and "Beauty Sleep" for mattresses; "Beer Nuts" and "Brew Nuts" for nuts; "City Girl" and "City Woman" for clothing; and "Kant-Twist" and "No-Twist" for C-clamps. See 1 J. McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 14.06, p. 14-25.

Appendix C

B. MURRAY'S AMENDED COMPLAINT AGAIN FAILS TO PROVIDE THE REQUIRED ELEMENTS TO MAINTAIN HIS CAUSES OF ACTION.

Murray claims that he may maintain his claims because confusion may occur even though the services are unrelated. This Court disagrees. The four cases cited by Murray involved goods or services which were sufficiently related to cause a likelihood of confusion. *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 465 (3d Cir. 1983) (using the identical Lapp trademark for electrical products); *Marathon Manufacturing Co. v. Enerlite Products Corp.*, 767 F.2d 214, 220 (5th Cir. 1985) (involving the Marathon nickel cadmium battery and the Marathon 10- 12 volt battery pack which consists of 10 1½ volt nickel cadmium "D: size battery cells.); *Rodeo Collection Ltd v. West Seventh*, 812 F.2d 1215, 1218-1219 (9th Cir. 1987) (involving the service marks "Rodeo Collection" and "The Collection" which refer to two shopping centers); *Officials Airlines Guides, Inc. v. Goss*, 6 F.3d 1385, 1391 (9th Cir. 1993) ((The two travel guides "The Travel Planner" and "OAG Travel Planner" were related but not in direct competition, and there was a sufficient likelihood of confusion); *United States v. Hon*, 904 F.2d 803, 807 (2d Cir. 1990), *cert. denied*, 498 U.S. 1069 (1990) (involving an appeal from a criminal conviction for trafficking in and attempting to traffic in counterfeit wristwatches. The court looked to the Lanham Act for guidance on the issue of confusion recognizing that a non-purchaser's confusion is relevant to the inquiry, but the goods at issue were identical-the genuine watches versus the imitations). The *Goss* court noted an eight factor test as relevant in determining the likelihood of confusion:

> "1. strength of the mark; 2. proximity of the goods; 3. similarity of the marks; 4. evidence

> of actual confusion; 5. marketing channels used; 6. types of goods and degree of care likely to be exercised by the purchaser; 7. defendant's intent in selecting the mark; and 8. likelihood of expansion of product lines."

6 F.3d at 1391. Murray does not meet this test.

This Court finds that Murray has again failed to sufficiently plead any nexus between the type of services provided by "America Speaks" and "America's Talking". This Court is not persuaded by Murray's reverse confusion claim. All of the cases cited by Murray involve goods or services which are related or identical. *Ameritech, Inc. v. American Information Technologies Corp.*, 811 F.2d 960, 964 (6th Cir. 1987) (reverse confusion occurred where the two parties used the identical "Ameritech" mark for telecommunications wiring and equipment, and there was evidence of actual confusion); *Americana Trading, Inc. v. Russ Berrie & Co.*, 966 F.2d 1284, 1287 (9th Cir. 1992) (involving the sale of stuffed bears in wedding outfits one under the "Wedding Bears" mark and the other with a tag using the words "Wedding Bear" attached to the stuffed bears); *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 957 (7th Cir. 1992) (reverse confusion possible between the Gatorade advertisements calling Gatorade "thirst aid for that deep down body thirst" and the "Thirst Aid" mark for drinks); *Banff, Ltd. v. Federated Department Stores, Inc.* 841 F.2d 486, 490 (2d Cir. 1988) (reverse confusion possible for use of the marks "Bee Wear" and "B Wear" for clothing sold in competing stores).

Murray's only allegations creating any sort of nexus between the two marks is that "America Speaks" provides market research and analysis which includes the use of polling

research for television commercial advertising. There is no similar allegation for "America's Talking" other than Murray's allegation that "America's Talking" provided one poll of a newsworthy event to a news service.[1]

This Court finds that the services of the two marks are not related as a matter of law. This Court provided Murray with a second chance to amend his pleading to create this nexus if one existed. Murray's Amended Complaint provides minor modifications to the original Complaint but no modifications which cure the defects regarding the requisite similarity in the services provided under these two marks, and the possibility of consumer confusion that might be caused by the similarity between the two marks. Therefore, the Court **grants** CNBC'S Motion to Dismiss**with prejudice** and**without leave** to amend.

IT IS SO ORDERED

DATED: Dec. 12, 1994

s/ Dickran Tevrizian
Dickran Tevrizian, Judge
United States District Court

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1. Murray also contends that interactive polling is a "natural area of expansion" from its federal registration for market research and analysis and there is a likelihood that confusion will occur with this expansion. This Court disagrees. First, Murray only claims that he intends to use the same technology-the telephone not the same services as CNBC. Second, none of the cases cited by Murray stand for his proposition that an allegation that CNBC's activities are in his intended zone of expansion is enough to state a claim. Finally, neither the *Goss* nor the *Eclipse Associates, Ltd. v. Data General Corp.*, 894 F.2d 114 (9th Cir. 1990) case states that an allegation of intent to expand is enough to defeat a motion for judgment on the pleadings or to dismiss. Dismissal is appropriate where the complaint shows that the services are not related. *Tojo*, 645 F.2d at 790-791. Dismissal is appropriate here.

APPENDIX D — ORDER GRANTING CNBC's MOTION TO DISMISS WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED OCTOBER 3, 1994

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 94-5175 DT (Mcx)

ROBERT MURRAY, an individual, d.b.a., AMERICA SPEAKS,

Plaintiff,

vs.

CABLE NATIONAL BROADCASTING, COMPANY, a corporation, d.b.a., AMERICA'S TALKING, INC.,

Defendant.

ORDER GRANTING DEFENDANT CNBC, INC.'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) WITH LEAVE TO AMEND

Background

This action stems from an alleged trademark infringement. Plaintiff Robert Murray ("Murray") registered the trademark "America Speaks" for market research and analysis. Complaint, ¶ 6. Murray personally interviews consumers for corporate clients in his "man-on-the-street" video surveys and polling services. Complaint, ¶ 6. Murray then provides the

interviews to his corporate clients for use in their television commercials. Complaint, ¶ 8. These interviews have made Murray a well-recognized figure. Complaint, ¶ 5.

"America's Talking" is an "all-talk cable television network" owned by Defendant CNBC, Inc. (improperly sued as Cable National Broadcasting Company, Inc.). Complaint, ¶ 7. CNBC has distributed survey data on topics of public interest to the news media under the service mark "America's Talking" and television news shows have broadcast the data as an "America's Talking" poll. Complaint, ¶ 7. CNBC also intends to release additional polling and survey data under the "America's Talking" mark. Complaint, ¶ 7.

Murray claims the use of the mark "America's Talking" infringes on his "America Speaks" trademark. Murray claims that "America's Talking" has conducted and reported on a newsworthy "public interest" poll and consumer confusion is likely to occur.

CNBC filed this Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Discussion

A. STANDARD

In considering a motion a dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume that the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *United States v. City of Redwood City,* 640 F.2d 963, 967 (9th Cir. 1981) Moreover, even if the face of the pleadings indicates

that recovery is unlikely, the plaintiff is still entitled to offer evidence in support of the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Redwood City*, 640 F.2d at 967. Finally the court may not dismiss complaints pursuant to Rule 12(b) (6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Russel v. Landrieu*, 621 F. 2d 1037, 1039 (9th Cir. 1980).

To maintain his causes of action for trademark infringement (15 U.S.C. § 1114) and false designation of origin (15 U.S.C. § 1125 (a), Murray must show that CNBC's use of the same or similar mark is likely to cause consumer confusion, mistake or deception. *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir. 1985); *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 231 (9th Cir. 1989). Under California law, the likelihood of confusion is also the test for an unfair competition action. *Tomlin v. Walt Disney Productions*, 18 Cal. App.3d 226, 235, 96 Cal. Rptr. 118 (1971). The *General Conference* court set forth the following eight-part test for determining whether there was a likelihood of confusion between two marks: (1) strength of the registered service mark; (2) The proximity of the goods; (3) the similarity of the competing service marks; (4) the evidence of actual confusion; (5) market channels used; (6) the type of goods and degree of care exercised by the purchasers; (7) defendant's intent; and (8) the likelihood of expansion of product lines. 887 F.2d at 231. When it is clear from the application of this test that confusion is not likely, the action should be dismissed. *Toho v. Sears, Roebuck & Co.*, 645 F.2d 788 (9th Cir. 1981) (action dismissed for failure to state a claim where both the marks "Godzilla" and "Bagzilla" and the goods they identified were different.)

Appendix D

The court must view the trademark in its entirety, as appears in the marketplace and cannot dissect the mark into parts. *California Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 51, 1455 (9th Cir. 1985). The *California Cooler* court held at "a composite geographic mark should not be dissected into its parts to determine whether it is primarily geographical or not. It is the likely reaction of customers to the total mark that is at issue. "(Citation omitted) *Id.* at 1455. The Supreme Court has held that use of the mark "American" did not render "American Girl" geographically descriptive and upheld the finding of infringement of "American Girl" by the mark "American Lady". *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 256-259 (1916). The courts have found the following marks confusing: "Arise" and "Awake" for breakfast drinks; "Beauty-Rest" and "Beauty Sleep" for mattresses; "Beer Nuts" and "Brew Nuts" for nuts; "City Girl" and "City Woman" for clothing; and "Kant-Twist" and "No-Twist" for C-clamps. See 1 J. McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 14.06, p. 14-25.

B. MURRAY'S COMPLAINT FAILS TO PROVIDE THE REQUIRED ELEMENTS TO MAINTAIN HIS CAUSES OF ACTION.

CNBC claims that the use of the terms "American" and "Speaks" can not be used to form the basis of an infringement case because they are in common use and CNBC uses a different form of the word "America" and the second words, "Speaks" and "Talking", are completely different. The Court disagrees. The court finds that the marks "America Speaks" and "America's Talking" must be viewed in their entirety and cannot be separated or this analysis.

Appendix D

Murray has failed, however, to sufficiently plead any nexus between the type of services provided by "America Speaks" and "America's Talking". Murray's only allegation creating any sort of nexus between the two marks is that both are used in the television media. Murray asserts that "America Speaks" is affiliated with the use of polling research for television commercial advertising. There is no similar allegation for "America's Talking" other than Murray's allegation that "America's Talking" provided one poll of a newsworthy event to a news service. This Court is not convinced that the services of the two marks are so sufficiently different and thus unrelated as a matter of law. Murray may be able to cure these defects in his Complaint to plead the requisite similarity in the services provided under these two marks, and the possibility of consumer confusion caused by the similarity between the two marks. Therefore, the Court **grants** CNBC's Motion to Dismiss without prejudice and with **twenty days leave** to amend the Complaint.

IT IS SO ORDERED.

DATED: October 3, 1994

s/ Dickran Tevrizian
Dickran Tevrizian, Judge
United States District Court

APPENDIX E — RELEVANT STATUTE
15 U.S.C. § 1114

Title VI — Remedies

Infringer Liable in Civil Action

SEC. 32 (*15 U.S.C. 1114*). **(1)** Any person who shall, without the consent of the registrant —

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

As used in this subsection, the term "any person" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this

chapter in the same manner and to the same extent as any nongovernmental entity.

* * *

Innocent Acts by Printers, Publishers and Broadcasters

SEC. 32(2) (*15 U.S.C. 1114(2)*). Notwithstanding any other provision of this Act, the remedies given to the owner of a right infringed under this Act or to a person bringing an action under section 43(a) shall be limited as follows:

(A) Where an infringer or violator is engaged solely in the business of printing the mark or violating matter for others and establishes that he or she was an innocent infringer or innocent violator, the owner of the right infringed or person bringing the action under section 43(a) shall be entitled as against such infringer or violator only to an injunction against future printing.

(B) Where the infringement or violation complained of is contained in or is part of paid advertising matter in a newspaper, magazine, or other similar periodical or in an electronic communication as defined in section 2510(12) of title 18, United States Code, the remedies of the owner of the right infringed or person bringing the action under section 43(a) as against the publisher or distributor of such newspaper, magazine, or other similar periodical or electronic communication shall be limited to an injunction against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodicals or in future transmissions of such electronic communications. The

limitations of this subparagraph shall apply only to innocent infringers and innocent violators.

(C) Injunctive relief shall not be available to the owner of the right infringed or person bringing the action under section 43(a) with respect to an issue of a newspaper, magazine, or other similar periodical or an electronic communication containing infringing matter or violating matter where restraining the dissemination of such infringing matter or violating matter in any particular issue of such periodical or in an electronic communication would delay the delivery of such issue or transmission of such electronic communication after the regular time for such delivery or transmission, and such delay would be due to the method by which publication and distribution of such periodical or transmission of such electronic communication is customarily conducted in accordance with sound business practice, and not due to any method or device adopted to evade this section or to prevent or delay the issuance of an injunction or restraining order with respect to such infringing matter or violating matter.

(D) As used in this paragraph

(i) the term "violator" means a person who violates section 43(a); and

(ii) the term "violating matter" means matter that is the subject of a violation under section 43(a).

* * *

APPENDIX F — AMENDED COMPLAINT WITH EXHIBIT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED OCTOBER 24, 1994

R. Joseph Trojan, Bar No. 137067
L. Rae Connet, Bar No. 156844
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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV 94-5175 DT (Mcx)

ROBERT MURRAY, an individual, d.b.a., AMERICA SPEAKS,

Plaintiff,

v.

CABLE NATIONAL BROADCASTING, COMPANY, a corporation, d.b.a., AMERICA'S TALKING,

Defendant.

AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR TRADEMARK INFRINGEMENT, FALSE DESIGNATION OF ORIGIN, AND UNFAIR COMPETITION

Appendix F

DEMAND FOR JURY TRAIL

The Plaintiff hereby complains as follows:

I. THE PARTIES:

1. At all times herein alleged, Robert Murray (hereinafter, MURRAY) has had his principal place of business within the Central District of California and currently resides in Santa Monica, California.

2. Defendant Cable National Broadcasting Company (hereinafter, CNBC), has its principal place of business in Fort Lee, New Jersey and does business in the Central District of California.

II. JURISDICTION AND VENUE

3. The United States District Court for the Central District of California has federal subject matter jurisdiction over the claim for violation of a federally registered trademark pursuant to 28 U.S.C. § 1338(a). The Court has subject matter jurisdiction over the related claims for unfair competition pursuant to 28 U.S.C. § 1338(b) and under principles of pendent and ancillary jurisdiction.

4. Venue is proper within the Central District of California because the defendant does substantial business within the Central District and is wholly owned and controlled by the National Broadcasting Company (NBC) from within the Central District.

Appendix F

III. FACTUAL BASIS FOR COMPLAINT:

5. MURRAY is a nationally recognized figure in the consumer survey field and is well known for his man-on-the-street consumer survey style. MURRAY's consumer interviews as the Shell Question Man and surprise interviews in supermarkets for Maxwell House instant coffee have made MURRAY a well recognized figure and has created substantial goodwill with the American public.

6. MURRAY is the owner of Federal Service Mark Registration No. 1,832,403 for AMERICA SPEAKS for market research and analysis, which is attached hereto as Exhibit 1. MURRAY is engaged in the business of providing his unique style of man-on-the-street video consumer survey and polling services under the AMERICA SPEAKS service mark and has the exclusive right to use the AMERICA SPEAKS service mark in the United States.

7. On or about July 4, 1994, Defendant CNBC launched a new all-talk cable television network which CNBC has named AMERICA's TALKING. Plaintiff alleges on information and belief that among the services offered by Defendant's AMERICA's TALKING are national polling surveys. Plaintiff further alleges on information and belief that the defendant has distributed survey data on topics of public interest to the news media under the service mark AMERICA's TALKING and that television news shows have broadcast the data as an AMERICA's TALKING poll. Plaintiff is specifically aware of at least one such poll relating to the O.J. Simpson matter being broadcast on the television news within the Central District and alleges on information and belief that the defendant intends to release additional polling and survey data under the

AMERICA's TALKING mark as a regular business practice in conjunction with its all talk television network.

8. Plaintiff further alleges that his AMERICA SPEAKS man-on-the-street marketing interviews are provided to his clients for use in their television commercials and that the Defendant offers its entertainment and polling services under the AMERICA's TALKING mark through the same commercial channels of trade in the television industry.

9. MURRAY placed the defendant on notice of his rights before the defendant launched its AMERICA's TALKING television and polling services, yet the defendant chose to ignore MURRAY's rights. MURRAY repeated his demand that the defendant immediately cease and desist from its infringing activities after the defendant launched its television and polling services, yet the defendant has willfully chosen to ignore plaintiff's rights thereby necessitating this law suit.

IV. FIRST CAUSE OF ACTION FOR TRADEMARK INFRINGEMENT:

10. Plaintiff hereby re-alleges and fully incorporates by reference the allegations contained in paragraphs 1 through 9, inclusive.

11. The plaintiff is the lawful owner of United States Service Mark Registration No. 1,832,403 for AMERICA SPEAKS, which he has been in use by the plaintiff in United States commerce at least as early as October, 1992. The plaintiff has the sole and exclusive right to use the service mark in United States commerce.

Appendix F

12. The plaintiff's and the defendant's AMERICA SPEAKS and AMERICA's TALKING service marks are confusingly similar to each other in that they have the identical meaning, and the defendant's use of its AMERICA's TALKING mark in the same channels of trade as those used by plaintiff for his AMERICA SPEAKS mark is likely to cause confusion, mistake, and/or deception as to the source and/or sponsorship of the services offered by the parties in violation of plaintiff's rights under 15 U.S.C. § 1114. In fact, considering the superior resources of CNBC, there is a strong likelihood that substantial reverse confusion will occur and that consumers will not distinguish between AMERICA SPEAKS and AMERICA's TALKING.

12.5 The plaintiff further alleges that the defendant is using its AMERICA's TALKING mark in conjunction with interactive polling services whereby television viewers respond to polling questions by calling telephone numbers that correspond to the viewer's answer. Long before the defendant launched its CNBC network, the plaintiff had identified interactive polling services as the wave of the future in the field of marketing research and analysis and had informed business associates of his plans to expand the polling services offered under AMERICA SPEAKS to include interactive polling. It is highly likely that the plaintiff will be expanding into the interactive polling market in the foreseeable future. The defendant's recent entry into the interactive polling market using its AMERICA's TALKING mark is likely to cause confusion, mistake, and/or deception as to the source of the services when the plaintiff expands into the same market using his AMERICA SPEAKS mark. The defendant's use of its AMERICA's TALKING mark within the scope of plaintiff's natural area of expansion constitutes a violation of the

plaintiff's rights for which the plaintiff is entitled to damages and injunctive relief.

12.6 The plaintiff further alleges that the defendant's use of a confusingly similar mark will cause confusion not only among buyers of the services of each party, but will also result in post-sale confusion among members of the public who view the respective marks regardless of whether they were purchasers of the services or not. The plaintiff alleges that such post-sale confusion among non-purchasers has been actionable under the Lanham Act since 1962 and is now well settled in the field of trademark law. Therefore, the plaintiff is entitled to damages for the defendant's violation of his rights and entitled to an injunction to put an end to such post-consumer confusion.

13. The plaintiff alleges that the defendant has ignored his demands that CNBC cease and desist its infringing activities and has continued to wilfully infringe upon plaintiff's federally registered trademark rights without any legal justification whatsoever thereby entitling plaintiff to all of the following relief: an injunction, the defendant's profits, plaintiff's damages, treble damages, costs, and attorney fees pursuant to 15 U.S.C. §§ 1116 and 1117.

V. SECOND CAUSE OF ACTION FOR FALSE DESIGNATION OF ORIGIN:

14. Plaintiff hereby re-alleges and fully incorporates by reference the allegations contained in paragraphs 1 through 13, inclusive.

15. Plaintiff alleges that CNBC's use of the term and/or name AMERICA's TALKING for its television and polling

services is likely to cause confusion, to cause mistake, or to deceive as to the affiliation, connection, or association of CNBC's services with plaintiff and/or cause confusion, mistake, or deceive as to the origin, sponsorship, and/or approval of said services in violation of 15 U.S.C. § 1125(a).

16. The plaintiff alleges that the defendant has ignored his demands that CNBC cease and desist its infringing activities and has continued to wilfully infringe upon plaintiff's trademark rights without any legal justification whatsoever thereby entitling plaintiff to all of the following relief: an injunction, the defendant's profits, plaintiff's damages, treble damages, costs, and attorney fees pursuant to 15 U.S.C. §§ 1116 and 1117.

VI. THIRD CAUSE OF ACTION FOR UNFAIR COMPETITION:

17. Plaintiff hereby re-alleges and fully incorporates by reference the allegations contained in paragraphs 1 through 16, inclusive.

18. The Plaintiff's and the Defendant's AMERICA SPEAKS and AMERICA's TALKING service marks are confusingly similar to each other in that they have the identical meaning, and the defendant's use of its AMERICA's TALKING mark in the same channels of trade as those used by plaintiff for his AMERICA SPEAKS mark is likely to cause confusion, mistake, and/or deception as to the source and/or sponsorship of the services offered by the parties in violation of plaintiff's rights under California unfair competition law. In fact, considering the superior resources of CNBC, there is a strong likelihood that substantial reverse confusion will occur and that

consumers will not distinguish between AMERICA SPEAKS and AMERICA's TALKING.

19. The defendant's acts of unfair competition are causing irreparable harm to plaintiff for which plaintiff is entitled to damages and injunctive relief.

VII. DEMAND FOR JURY TRIAL:

34. Plaintiff hereby exercises his rights under the Seventh Amendment to the United States Constitution and demands a jury trial in accordance therewith.

VIII. PRAYER FOR RELIEF:

Plaintiff hereby prays for the following relief:

a. compensatory damages and defendant's profits;

b. statutory treble damages for wilful infringement;

c. an injunction permanently restraining the defendant from infringing upon plaintiff's rights;

d. costs and attorney's fees;

e. common law punitive damages;

f. any and all other relief the Court deems just.

Appendix F

Respectfully submitted,

TROJAN LAW OFFICES

Date: 10/24/94

by s/ R. Joseph Trojan
R. Joseph Trojan
Attorney for Plaintiff
ROBERT MURRAY d/b/a/
AMERICA SPEAKS

Appendix F

EXHIBIT 1

Prior U.S. Cl.: 101 **Reg. No. 1,832,403**

United States Patent and Trademark Office
Registered Apr. 19, 1994

SERVICE MARK
PRINCIPAL REGISTER

AMERICA SPEAKS

MURRAY, ROBERT J. (UNITED STATES CITIZEN)
10946 NATIONAL BOULEVARD, #3
LOS ANGELES, CA 90064

FOR: MARKET RESEARCH AND ANALYSIS
IN CLASS 35 (U.S. CL. 101).

FIRST USE 10-29-1992; IN COMMERCE 10-29-1992.

SN 74-317,514, FILED 9-25-1992.

KAREN L. FEISTHAMEL, EXAMINING ATTORNEY